Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. GARY O'DELL, Defendant.	No. CR98-3002-MWB **ORDER REGARDING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE**

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I. INTRODUCTION AND FACTUAL BACKGROUND

On January 14, 1998, a three-count indictment was returned against numerous defendants, charging Steve Gomez, Servel Barragan, Joseph Ligidakis, and Summer Hoffarth with money laundering, in violation of 18 U.S.C. § 1956, and charging all defendants, including defendant O'Dell, with conspiracy to distribute methamphetamine, cocaine and marijuana, in violation of 21 U.S.C. § 846. The indictment also sought the forfeiture of certain real and personal property. On February 20, 1998, a three-count superceding indictment was filed charging defendants Gomez, Barragan, Ligidakis, and Hoffarth with money laundering, in violation of 18 U.S.C. § 1956, and charging all defendants with conspiracy to distribute methamphetamine, cocaine and marijuana, in violation of 21 U.S.C. § 846. The superceding indictment also sought the forfeiture of certain real and personal property. On May 12, 1998, a second superceding indictment was returned charging defendants Gomez, Barragan, Ligidakis, Hoffarth, Paul Reson, Dean Oliver, Scott Hart, Mike Lewis, and Gary O'Dell with money laundering, in violation of 18 U.S.C. § 1956, and charging all defendants with conspiracy to distribute methamphetamine, cocaine and marijuana, in violation of 21 U.S.C. § 846. The second superceding indictment again sought the forfeiture of certain real and personal property.

Following a jury trial, defendant O'Dell was convicted of money laundering, conspiracy to distribute controlled substances, and conspiracy to commit money laundering and was sentenced to 210 months imprisonment. Defendant O'Dell appealed his conviction. His appeal was denied. *See United States v. O'Dell*, 204 F.3d 829 (8th Cir. 2000). Defendant O'Dell subsequently filed his current § 2255 motion.

In his motion, O'Dell challenges the validity of his conviction and sentence on the following grounds: (1) that his counsel was ineffective for failing to object to leading questions; (2) that his counsel was ineffective for failing to obtain a handwriting analysis of defendant in regard to the forged cashier checks; (3) that his counsel was ineffective for

failing to ask for a limited instruction regarding cooperating witnesses; (4) that his counsel was ineffective because he was careless in the way he phrased questions to witnesses; (5) that his counsel was ineffective for failing to object to coconspirator testimony; (6) that his counsel was ineffective because he made no record regarding the advice he had given to defendant O'Dell about whether to testify at trial; (7) that his counsel was ineffective in not objecting to remarks made during the prosecutor's rebuttal summation; (8) that his counsel was ineffective at the time of sentencing for failing to obtain a copy of the trial transcript; (9) that his counsel was ineffective for failing to understand the admissibility of polygraph examination results; and (10) that his counsel was ineffective for failing to seek a maximum term of imprisonment of five years on the conspiracy charge. Defendant O'Dell amended his § 2255 motion to include a claim of factual innocence based on the United Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

II. LEGAL ANALYSIS

A. Standards Applicable To § 2255 Motions

The Eighth Circuit Court of Appeals has described 28 U.S.C. § 2255 as "the statutory analogue of habeas corpus for persons in federal custody." *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). In *Poor Thunder*, the court explained the purpose of the statute:

> [Section 2255] provides a remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a sentence was 'imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.'

Id. at 821 (quoting 28 U.S.C. § 2255). Of course, a motion pursuant to § 2255 may not

serve as a substitute for a direct appeal, rather "[r]elief under [this statute] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

The failure to raise an issue on direct appeal ordinarily constitutes a procedural default and precludes a defendant's ability to raise that issue for the first time in a § 2255 motion. *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 730 (1998); *Bousley v. Brooks*, 97 F.3d 284, 287 (8th Cir. 1996), *cert. granted*, 118 S. Ct. 31 (1997); *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993) (citing *United States v. Frady*, 456 U.S. 152 (1982)). This rule applies whether the conviction was obtained through trial or through the entry of a guilty plea. *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998); *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997); *Matthews*, 114 F.3d at 113; *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997) (per curiam). A defendant may surmount this procedural default only if the defendant "'can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.'" *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

B. Analysis Of Issues

1. Ineffective assistance of counsel claims

Defendant O'Dell asserts ten claims of ineffective assistance of counsel. Defendant O'Dell asserts that his counsel was ineffective in the following respects: (1) for failing to object to leading questions; (2) for failing to obtain a handwriting analysis of defendant in

regard to the forged cashier checks; (3) for failing to ask for a limited instruction regarding cooperating witnesses; (4) he was careless in the way he phrased questions to witnesses; (5) for failing to object to coconspirator testimony; (6) making no record regarding the advice he had given to defendant O'Dell about whether to testify at trial; (7) by not objecting to remarks made during the prosecutor's rebuttal summation; (8) for failing to obtain a copy of the trial transcript; (9) for failing to understand the admissibility of polygraph examination results; and (10) for failing to seek a maximum term of imprisonment of five years on the conspiracy charge. The court will consider each of these claims *seriatim*.

Many of the claims O'Dell has presented in his § 2255 motion were not raised on direct appeal. However, claims of ineffective assistance of counsel normally are raised for the first time in collateral proceedings under 28 U.S.C. § 2255. *See United States v. Martinez-Cruz*, 186 F.3d 1102, 1105 (8th Cir. 1999) (reiterating that ineffective assistance of counsel claims are best presented in a motion for post-conviction relief under 28 U.S.C. § 2255); *United States v. Mitchell*, 136 F.3d 1192, 1193 (8th Cir. 1998) (noting ineffective assistance of counsel claims more properly raised in 28 U.S.C. § 2255 motion) (citing *United States v. Martin*, 59 F.3d 767, 771 (8th Cir. 1995) (stating ineffective assistance of counsel claims "more appropriately raised in collateral proceedings under 28 U.S.C. § 2255")); *United States v. Scott*, 26 F.3d 1458, 1467 (8th Cir. 1994) (declining to consider ineffective assistance of counsel claims raised for first time on direct appeal where claim not raised in a motion for postconviction relief pursuant to 28 U.S.C. § 2255). In order to prove a claim of ineffective assistance of counsel, a convicted defendant must demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "the deficient performance prejudiced the defense." *Id.* at 687*; Furnish v. United States of America*, 252 F.3d 950, 951 (8th Cir. 2001) (stating that the two-prong test set forth in

Strickland requires a showing that (1) counsel was constitutionally deficient in his or her performance and (2) the deficiency materially and adversely prejudiced the outcome of the case); *Garrett v. Dormire*, 237 F.3d 946, 950 (8th Cir. 2001) (same). Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Indeed, "counsel must exercise reasonable diligence to produce exculpatory evidence[,] and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). However, there is a strong presumption that counsel's challenged actions or omissions were, under the circumstances, sound trial strategy. *Id.* at 689, 104 S. Ct. 2052; *Collins v. Dormire*, 240 F.3d 724, 727 (8th Cir. 2001) (in determining whether counsel's performance was deficient, the court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .") (citing *Strickland*). With respect to the "strong presumption" afforded to counsel's performance, the Supreme Court specifically stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome

> the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689 (citations omitted).

To demonstrate that counsel's error was prejudicial, thereby satisfying the second prong of the *Strickland* test, a habeas petitioner must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The court need not address whether counsel's performance was deficient if the defendant is unable to prove prejudice. *Apfel*, 97 F.3d at 1076 (citing *Montanye v. United States*, 77 F.3d 226, 230 (8th Cir.), *cert. denied*, 117 S. Ct. 318 (1996)); *see also Pryor v. Norris*, 103 F.3d 710, 712 (8th Cir. 1997) (observing "[w]e need not reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness."). The Supreme Court has stated that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

Here, the court is compelled to conclude that defendant O'Dell has not demonstrated that he was prejudiced by his counsel's alleged errors, either individually or in aggregate, and therefore cannot demonstrate ineffective assistance of counsel. For example, defendant O'Dell does not indicate how the outcome of his trial would have been altered if his counsel had made timely objections to the government's use of leading questions. Defendant O'Dell does not suggest that defense objections to the government's use of leading questions would have prevented the government from introducing any specific evidence. The court notes that in the only decision relied upon by defendant O'Dell to support his argument on this point, *United States v. Kladouris*, 739 F. Supp. 1221, 1230 n.11 (N.D. Ill. 1990), the

district court found that defense counsel's specific errors did not rise to the level of ineffective assistance of counsel. *Id* at 1231. The court instead granted the defendant a new trial under Federal Rule of Criminal Procedure 33. *Id*. Similarly, defendant O'Dell has failed to show he was prejudiced by his counsel's alleged careless phrasing of questions and failure to object to co-conspirator hearsay statements and therefore cannot demonstrate ineffective assistance of counsel on those grounds.

Likewise, defendant O'Dell has not demonstrated that he was prejudiced by his counsel's failure to object to remarks made during the prosecutor's rebuttal summation. In his rebuttal closing argument, the prosecutor, in addressing the government's ability to compel witnesses to testify, stated:

> [T]his Government cannot force somebody to testify if they don't want to. Even if they're convicted of a crime, there is no way for the Government to force the person to take the stand to tell what they know. You can't draw out the facts from them of [sic] their knowledge in any way by forcing them to do it. You can't threaten them. You can't put them in jail longer. There's no way to draw out the facts they know from them. The only way we can do it in this system is to do it voluntarily.

Prosecutor's Closing Argument Tr. at 38-39. Although defense counsel did not object to the prosecutor's closing, immediately after it was made, the court *sua sponte*, expressed its concern outside of the presence of the jury that the remarks were "very misleading." After a discussion with counsel for both parties, the court gave the following curative instruction to the jury immediately:

> [The prosecutor] told you that the Government cannot force somebody to testify if they don't want to, even if they're convicted of a crime, and that they can't go to jail for any longer if they refuse to testify. And that's not an accurate statement of the law. The Government may give witnesses use

> immunity, and you saw an example of it in this very case, and there are other methods available to the Government to obtain the testimony of a witness in this case. And I just want you to remember that you're the sole judges of the credibility of witnesses, and the weight to be given any witness' testimony is solely in your discretion.

Closing Argument Tr. at 65-66. On direct appeal, the Eighth Circuit Court of Appeals found that while the government's remarks were improper, the court's instruction "was adequate to cure the prosecutor's remarks." *O'Dell*, 204 F.3d at 835. The court also noted that:

> The remarks were an isolated event, occurring during rebuttal closing arguments, and there is nothing to suggest that there was a cumulative detrimental effect. The properly admitted evidence, moreover, was certainly strong enough to support the verdict.

Id. The Court of Appeals went on to conclude that the prosecutor's remarks "were not prejudicial to the degree of depriving O'Dell of a fair trial." *O'Dell*, 204 F.3d at 836. For the reasons set forth by the Eighth Circuit Court of Appeals on direct appeal, the court concludes that O'Dell has failed to show he was prejudiced by his counsel's failure to object to the prosecutor's closing argument and therefore cannot demonstrate ineffective assistance of counsel on this ground.

The court reaches the same conclusion with respect to defendant O'Dell's claims that his counsel was ineffective at the time of sentencing. Defendant O'Dell does not explain how the sentencing would have been altered had his counsel obtained a trial transcript prior to sentencing. Similarly, with regard to O'Dell's claim that his attorney failed to "understand" the admissibility of polygraph evidence, O'Dell has not demonstrated that he could have taken and passed a polygraph examination and had the results of that

examination admitted at the time of his sentencing. Indeed, in *United States v. Ortega*, 270 F.3d 540 (8th Cir. 2001), the Eighth Circuit Court of Appeals indicated that most courts have refused to admit polygraph examinations at sentencing because of reliability concerns:

> We note that most courts of appeal that have considered the issue of admissibility of polygraph evidence at sentencing have upheld refusals to admit such evidence. *See e.g. United States v. Thomas*, 167 F.3d 299, 307-08 (6th Cir. 1996) (affirming exclusion of defendant's polygraph evidence in support of role reduction); *United States v. Messina*, 131 F.3d 36, 42 (2d Cir.1997) (defendant's "polygraph evidence . . . was unworthy of credit"), *cert. denied*, 523 U.S. 1088, 118 S. Ct. 1546, 140 L. Ed.2d 694 (1998); *United States v. Stein*, 127 F.3d 777, 781 (9th Cir. 1997) (defendant's polygraph evidence was "too conclusory to be probative"); *cf. United States v. Weekly*, 118 F.3d 576, 581 (8th Cir.) (upholding denial of § 5C1.2(5) safety-valve exception because evidence of defendant's deceitfulness other than refusal to take polygraph examination), *cert. denied*, 522 U.S. 1020, 118 S. Ct. 611, 139 L. Ed.2d 497 (1997); *United States v. Pitz*, 2 F.3d 723, 729 (7th Cir.1993) (no plain error in sentencing court's reliance on witness's polygraph because it was only one factor in court's credibility assessment and court "recognized that polygraph tests are not an entirely reliable indication of veracity"), *cert. denied*, 511 U.S. 1130, 114 S. Ct. 2141, 128 L. Ed.2d 869 (1994).
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> As the Supreme Court noted in upholding a per se exclusion of polygraph evidence at court martial proceedings, "there is simply no consensus that polygraph evidence is reliable." *United States v. Scheffer*, 523 U.S. 303, 309, 118 S. Ct. 1261, 140 L. Ed.2d 413 (1998).

Ortega, 270 F.3d at 548.

The court similarly finds no prejudice resulted from O'Dell's attorney's failure to seek a maximum term of imprisonment of five years on the conspiracy charge. Defendant O'Dell was charged with conspiracy to distribute both marijuana and methamphetamine.

Because the sentencing here occurred prior to the United States Supreme Court's decision in *Apprendi*, the court determined the type and amount of controlled substance found. Because the court found that O'Dell was involved in a conspiracy to distribute methamphetamine, he was not subject to be being sentenced to the lesser five-year mandatory minimum sentence for marijuana. Therefore, this part of defendant O'Dell's motion is denied.

2. Applicability of the Apprendi decision

Defendant O'Dell also claims that his sentence was incorrect because the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) is applicable to his case and therefore he is factually innocent of the drug charge for which he was convicted because the drug type and quantity are elements of a crime and must be decided by the jury. Review of this issue is precluded by the Eighth Circuit Court of Appeals's conclusion that the *Apprendi* decision presents a new rule of constitutional law that is not of "watershed" magnitude and, consequently, petitioners may not raise *Apprendi* claims on collateral review. *Hines v. United States*, 282 F.3d 1002, 1004 (8th Cir.), *cert. denied*, 537 U.S. 900 (2002); *Sexton v. Kemna*, 278 F.3d 808, 814 n.5 (8th Cir. 2002), *cert. denied*, 537 U.S. 1150 (2003); *Murphy v. United States*, 268 F.3d 599, 600 (8th Cir. 2001), *cert. denied*, 534 U.S. 1169 (2002); *Jarrett v. United States*, 266 F.3d 789, 791 (8th Cir. 2001), *cert. denied*, 535 U.S. 1007 (2002); *United States v. Dukes*, 255 F.3d 912. 913 (8th Cir. 8th Cir. 2001), *cert, denied*, 534 U.S. 1150 (2002); *United States v. Moss*, 252 F.3d 993, 995 (8th Cir. 2001), *cert. denied*, 534 U.S. 1097 (2002). This view of the *Apprendi* decision has also been adopted by a clear majority of the other federal courts of appeals. *See, e.g., Sepulveda v. United States*, 330 F.3d 55 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77 (2d Cir.), *cert. denied*, 124 S. Ct. 840 (2003); *United States v. Brown*, 305 F.3d 304 (5th Cir. 2002); *Goode v. United States*, 305 F.3d 378 (6th Cir.),

cert. denied, 537 U.S. 1096 (2002); *Dellinger v. Bowen*, 301 F.3d 758 (7th Cir. 2002), *cert. denied*, 537 U.S. 1214 (2003); *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir.), *cert. denied*, 537 U.S. 939 (2002); *United States v. Sanders*, 247 F.3d 139 (4th Cir.), *cert. denied*, 534 U.S. 1032 (2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001), *cert. denied*, 536 U.S. 906 (2002). Therefore, the court is unable to reach the merits of O'Dell's claim.

C. Certificate Of Appealability

Defendant O'Dell must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability in this case. *See Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U .S. 834 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. Moreover, the United States Supreme Court reiterated in *Miller-El* that "'[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 123 S. Ct. at 1040 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The court determines that O'Dell's petition does not present questions of substance for appellate review, and therefore, does not make the requisite showing to satisfy § 2253(c). *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). With respect to O'Dell's claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C.

§ 2253(c).

III. CONCLUSION

Defendant O'Dell's § 2255 motion is **denied**, and this matter is **dismissed in its entirety**. Moreover, the court determines that the petition does not present questions of substance for appellate review. *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will not issue.

IT IS SO ORDERED.

DATED this 26th day of August, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA